

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA,

V.

BRIAN SWIENCINSKI, et al.

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CRIMINAL NO. 4:18-cr-368

**DEFENDANTS’ JOINT MOTION IN LIMINE TO PROHIBIT REFERENCE TO
STEPHEN M. THOMAS, M.D. AS AN “EXPERT” IN THE PRESENCE OF THE JURY**

The defendants – Brian Swiencinski, Vladimir Redko, M.D, Scott Breimeister, Christopher Ince, M.D., and Ronnie McAda – move in limine for an order from this Court preventing anyone at trial from referring to Stephen M. Thomas, M.D., as an “expert” in the presence of the jury. The notes of both the Advisory Committee to the Rules of Evidence and the *Fifth Circuit Pattern Jury Instructions* support this motion. Fed. R. Evid. 702 Committee Note on 2000 Amendments (“[T]here is much to be said for the practice that prohibits the use of the term ‘expert’ by both the parties and the court at trial. Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness’s opinion, and protects against the jury’s being overwhelmed by the so-called ‘experts.’”) (citations and internal quotation marks omitted); *Fifth Circuit Criminal Pattern Jury Instructions* 1.18 (“Expert Opinion Testimony”) (“The text of this instruction does not describe the witness as an ‘expert witness’ to avoid influencing the jury by use of that description.”); *see also United States v. Gutierrez-Castro*, 805 F. Supp.2d 1218, 1235 (D.N.M. 2011) (“The Court will allow McNutt to testify, but it will not put its imprimatur on him as an expert witness in the jury’s presence. The Court will not allow the United States to offer him as an expert witness, the Court will not certify McNutt as an expert witness in the jury’s presence, and the jury instructions will not refer to him as an expert.”).

Defense counsel has conferred with AUSA Aleza Remis, counsel for the government. She stated that the government does not oppose this motion so long as (1) the defendants do not improperly “open the door” to the issue of Dr. Thomas’ qualifications as an “expert” witness; and (2) the defendants agree not to refer to their own Rule 702 witnesses as “experts.” Counsel for the prosecution and defense request a brief discussion of this matter with the Court before trial begins.

Respectfully submitted,

<p><u>/s/ Jim E. Lavine</u> Jim E. Lavine Texas State Bar No. 12000300 Attorney in Charge Zimmerman Lavine & Zimmeman, P.C. 770 South Post Oak Lane, Suite 620 Houston, Texas 77056 (713) 552-0300 Email: jim.lavine@zlzslaw.com</p> <p><u>/s/ Brent E. Newton</u> Brent E. Newton Texas State Bar No. 00788155 Gerger, Hennessy & Martin LLP 700 Louisiana, Suite 2300 Houston, Texas 77002 (713) 224-4400 Email: bnewton@ghmfir.com</p> <p>Attorneys for Dr. Vladimir Redko</p> <p><u>/s/ Josh Schaffer</u> Josh Schaffer State Bar No. 24037439 1021 Main, Suite 1440 Houston, Texas 77002 (713) 951-9555 (713) 951-9854 (facsimile) josh@joshschafferlaw.com</p> <p>Dan Cogdell State Bar No. 04501500 Jones Walker 811 Main Street, Suite 2900 Houston, TX 77002 713.437.1869</p>	<p><u>/s/ Jeff Ansley</u> Jeffrey J. Ansley Texas Bar No. 00790235 jansley@vedderprice.com Arianna G. Goodman Texas Bar No. 24109938 agoodman@vedderprice.com Vedder Price, P.C. 100 Crescent Court, Suite 350 Dallas, Texas 75201 (469) 895-4790</p> <p>Attorneys for Ronnie McAda Jr.</p> <p><u>/s/ Brandon McCarthy</u> Brandon McCarthy (<i>admitted pro hac vice</i>) Attorney-in-Charge State Bar No. 24027486 Rachel M. Riley State Bar No. 24093044 S.D. Bar No. 2810706 KATTEN MUCHIN ROSENMAN LLP 2121 N. Pearl Street, Suite 1100 Dallas, TX 75201 Telephone: 214-765-3600 Facsimile: 214-765-3602 brandon.mccarthy@katten.com rachel.riley@katten.com</p> <p>Mary C. Fleming (<i>admitted pro hac vice</i>) KATTEN MUCHIN ROSENMAN LLP 2900 K Street NW, North Tower - Suite 200 Washington, DC 20007-5118 Telephone: 202-625-3754 Facsimile: 202-298-7570 mary.fleming@katten.com</p>
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CERTIFICATE OF SERVICE

A copy of this reply was served the day of filing on counsel of record by electronic mail from the Clerk of Court via the CM/ECF system.

/s/ Brent E. Newton
Brent E. Newton

CERTIFICATE OF CONFERENCE

I certify that on this 25th day of October 2022, I conferred with counsel for the government, AUSA Aleza Remis, concerning this motion. She stated that the government does not oppose this motion.

/s/ Brent E. Newton
Brent E. Newton